FILED
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 270

October Term, 1942.

STANLEY F. WALLACE,
Petitioner,

vs.

DELAWARE RIVER FERRY COMPANY OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS AND BRIEF IN SUPPORT THEREOF.

WILLIAM CALVIN GOTSHALK,
Attorney for, and
BARTHOLOMEW A. SHEEHAN,
Of Counsel with Petitioner.

L. F. Huntsinger Co., *Appellate Printers*, Camden, N. J.

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SUPREME COURT OF THE UNITED STATES.

No.

October Term, 1942.

STANLEY F. WALLACE,

Petitioner,

vs.

DELAWARE RIVER FERRY COMPANY OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought under the act of Congress March 4, 1915, Chapter 150, Section 20, as amended June 5, 1920, Chapter 250, Section 33 (46 U. S. C. 688), commonly called the Jones Act,

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain

an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

which act incorporates, by reference, the provisions of the Federal Employers' Liability Act, Title 45 U. S. C. A., Section 51 etc.,

"Section 51. *Liability of common carriers by railroad, in interstate or foreign commerce for injuries to employees from negligence.* Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Section 53. *Contributory negligence; diminution of damages.* In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that

the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

"Section 54. *Assumption of risks of employment.* In any action brought against any common carrier or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

in the county court in which the defendant maintained its registered office, to recover damages for injuries sustained by the petitioner, who was employed by the defendant. At the close of the plaintiff's case the defendant moved for a non-suit in its favor against the plaintiff. The Court granted the motion and on appeal to the Supreme Court of New Jersey the action of the trial court was affirmed and this decision, reported in 127 N. J. L. 513, was affirmed by the Court of Errors and Appeals of New Jersey on the opinion below by a divided court. This affirmance is officially noted at 130 N. J. L. 216. The plaintiff's proof at the trial consisted in a showing that the defendant operated a ferry across the Delaware River between terminals located in Camden, New Jersey, and Philadelphia, Penn-

sylvania, and the plaintiff worked in its employ as a deckhand assigned to one of its boats. It was further shown that on the 25th day of June, 1936, he was working the shift beginning at 1.45 P. M. and ending at 9.45 P. M.; that sometime between 7 and 7.20 P. M. his boat was about to dock on the Pennsylvania side of the river after making its way, with passengers and motor vehicles, from the New Jersey side. To accommodate the entrance and exit of these users of the ferry the boat was equipped with three sets of gates, both fore and aft, the middle one of which was used for vehicular traffic and the port and starboard ones for pedestrians, thus permitting the boat to be operated fore and aft interchangeably. The plaintiff was working alone on the bow of the boat as it moved into dock and on this occasion had opened the passenger gate on the starboard side, closing it behind him as he made his way out onto the deck. The bridge of this dock was operated by hand, rising or falling on the turning of a big wheel placed to the port side and operated manually by another workman called a bridgeman. There were also two other wheels, one on each side of the dock, called pulling in wheels on which are wound lengths of rope cable to the ends of which are attached huge hooks. It was the duty of the bridgeman to raise the bridge so that the deck of the boat slipped in under two wooden joists, which broke the perimeter of the dock by protruding over the water about sixteen to eighteen inches, and the duty of the plaintiff to reach from his position on the deck of the boat over to the bridge, pick up the hooked cable and insert it in a large pin that was driven into the deck of the boat. On the occasion in question the tide was running out and consequently pulled the boat to the port, which side edged into the dock first and permitted only the joist on the port side to take hold, while the boat was still free of the joist on the right side. At this juncture the plaintiff, in order to reach the rope cable, had

to step with his left foot onto the bridge as the boat continued its lateral and forward motion in. While thus stepping and with his foot in mid air he noticed that there was a footboard extending over the edge of the bridge. His balance was all to the left side and his foot came down on the board, slipped off between the bow of the boat and the side of the bridge as the boat pushed home and his foot was crushed, ultimately requiring amputation of the leg above the knee. The footboard is of planking four feet long by three and one-half feet wide and was used to provide safe footing for pedestrians by laying it over the point where the bow of the boat laid up against the bridge after the boat was made fast. The plaintiff contends that his injury was caused by the negligence and carelessness of the defendant's employees in permitting the footboard to lay extending over the bridge where they knew, or in the exercise of due care should have known, that the plaintiff would be required to step. The dock in question was the only berth in use at this time, so that it had just been vacated by another boat making the trip from the Pennsylvania to the New Jersey side. It was the duty of the deckhand on that boat, after the gates had been closed on the passengers and vehicular traffic, to lift the footboard from its position astride the surface of the bridge and the deck of the boat and put it back to a place on the bridge, then to unhook the cable fastened in the deck pin to permit the ferry boat to shove off and finally to board it as it did. A second deckhand performed the same operations on the port side to complete the unfastening of the boat. While this was being done the bridgeman, standing on the dock, turned the big wheel to raise the weight of the bridge from the deck of the boat and kept his position there after its departure to await the plaintiff's next incoming boat, then somewhere in stream, operating upon a twelve minute schedule Thus the bridgeman, whose further duty it was, ac-

cording to his testimony, "to take care of that bridge," stood for some appreciable period of time watching the bridge and had full opportunity to make such observation as would have disclosed to him the fact that the deckhand working the opposite side of the outgoing boat had not drawn the footboard completely back from the edge of the bridge. It is the contention of the plaintiff that the cause of his injury was the negligence of the deckhand on the outgoing boat in pulling the footboard back from the deck of the boat in such manner as to permit it to extend over the water beyond the edge of the bridge, and the carelessness of the bridgeman in failing to observe it in this dangerous position or, if he did observe it, in failing to pull it back onto the bridge to a place of safety.

JURISDICTIONAL STATEMENT.

The petitioner invokes the jurisdiction of this court for the following reasons:

1. The judgment of the New Jersey Court of Errors and Appeals in sustaining the judgment of non-suit entered by the trial court violates the petitioner's right to a trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. *Jacobs vs. State of New Jersey,* 316 U. S. 752, 86 Lawyers Edition 1166; *Bailey vs. Central Vermont Railroad Co.,* 87 Lawyers Edition Advance Opinions 1030, not yet officially reported.

2. The judgment of the New Jersey Court of Errors and Appeals, in sustaining the judgment of non-suit entered by the trial court, was contrary to the law established by applicable decisions of this court interpreting a federal question of substance, i. e., the right of a seaman to re-

cover damages in accordance with the act of Congress March 4, 1915, Chapter 150, Section 20, as amended June 5, 1920, Chapter 250, Section 33, (46 U. S. C. 688), commonly called the Jones Act. *Lingren vs. United States,* 281 U. S. 38; *Bainbridge vs. Merchants & Miners Transportation Co.,* 287 U. S. 278.

3. The judgment of the New Jersey Court of Errors and Appeals, in sustaining the judgment of non-suit entered by the trial court, violates Article 3, Section 2 of the Constitution of the United States vesting in the Supreme Court of the United States, and such inferior courts as have been ordained and established by Congress, power in all cases of admiralty and maritime jurisdiction.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. This case presents for determination the question whether or not the right to a trial by jury in a civil matter can be limited by the arbitrary usurpation of the jury function by any court.

2. The trial court in granting the defendant's motion of non-suit erred in that it applied the common law rule of negligence, contributory negligence and voluntary assumption of the risk prevailing in the forum and ignored the doctrine of comparative negligence followed by the federal courts in determining the rights of seamen for damages resulting from injury.

3. The state courts, by applying the law of the forum, nullified the effect of the decisions of this court establishing

concurrent federal and state jurisdiction by which venue in suits under the Jones Act was made available to an injured seaman.

4. To approve the decision of the New Jersey Court of Errors and Appeals, either tacitly by failure to review or expressly by affirmance, will provide the means by which the beneficent purposes of the Jones Act may be denied a special ward of this court, the seaman, if circumstances of time, place or residence, personal or corporate, should conspire to prevent his laying venue in a Federal District Court.

5. A failure to require a submission to a jury for determination, under proper instruction covering the Federal Statute involved and the pertinent decisions of this court, denies the petitioner substantive due process under the law.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the New Jersey Court of Errors and Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM CALVIN GOTSHALK,
Attorney for, and
BARTHOLOMEW A. SHEEHAN,
Of Counsel with Petitioner.

SUPREME COURT OF THE UNITED STATES.

STANLEY F. WALLACE,
Petitioner,

vs.

DELAWARE RIVER FERRY COMPANY OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM CALVIN GOTSHALK,
Attorney for, and
BARTHOLOMEW A. SHEEHAN,
Of Counsel with Petitioner.

SUPPORTING MEMORANDUM.

In urging reasons for and in support of the contention of the petitioner, this Honorable Court is respectfully petitioned to examine the opinion filed in the New Jersey Supreme Court on December 29, 1941 (State of the Case) page 107. The Learned Justice on whose opinion the Court of Errors and Appeals rested its affirmance opens by saying that the action was instituted below under Title 46 U. S. C. A., Section 688 and Title 45 U. S. C. A., Sections

51, 53 and 54, and then recites a résumé of the testimony submitted on behalf of the plaintiff petitioner with which there is no substantial complaint. The Court then said

> "we find no proof to sustain the allegations of the defendant's duty . . . where should the footboard have been, was there a standard practice, and if so, what? Where, by the long continued practice of the defendant's employees, at that particular ferry, should it have been? Upon what act or word of the defendant or of the defendant's employees did plaintiff have justified reason to believe the footboard should be elsewhere? These questions are not answered in the proofs."

Let us analyze the thought process implicit in the proposing of such queries. The Court clearly conceived it to be the duty of the plaintiff in order to establish a cause of action to show the standard practice or the regulations of the company prescribing the handling of the footboard and the maintenance of the bridge that in the given instance there was a departure from this accustomed prescribed practice. The Federal cases are exactly to the contrary. And it is submitted that the Appellate Court in approaching the problem from this point of view was consciously or unconsciously influenced by the language of the trial court in stating its reasons for granting the motion to nonsuit as follows:

> "Now it may have been perfectly proper for the board to have extended beyond the edge of the slip two inches, as he says, and without any negligence on the part of the defendant company. In fact that might have been the accustomed place for it."

The fallacy inherent in such reasoning is obvious because expressed in converse form, it says that if an act though it may be negligent in itself, has received the sanction

either of a regulation established by the ship-owner or of custom established in practice by the employees, its character is thereby transformed and it becomes a prudent and careful act. The argument of the Court is no less absurd because it is couched in interrogative rather than declarative form.

Again the Court stated

> "had Wallace been a passenger who stumbled over the footboard placed in the way of exit, the problem would be different. Not only was he not a passenger; he was an employee burdened with responsibility concerning that very accessory . . . all that we have is that Wallace failing to observe what was plainly observable. . . ."

Surely this statement is material only in determining whether or not the petitioner's negligence contributed to the accident and is indicative of the underlying conviction of the Court that because it did, the plaintiff could not recover. This is an absolute denial of the Congressional protection given the seaman in the statute making contributory negligence a pro tanto defense only. No other interpretation can be given the language of the Court especially in view of the implication that if the plaintiff had been a passenger, 'the problem would be different.' Thus the Court equivalently says the ship owner was negligent but not so far as a seaman is concerned because that is the only supportable theory upon which even a passenger could recover and if there was negligence in any degree on the part of the ship-owner or his employees, the fact that the plaintiff's contribution in negligence appeared even in overwhelming degree would be no bar to his right to have the issue submitted to a jury with proper instructions on diminution of damages. If any doubt remains as to the erroneous concept entertained by the Court concerning a

seaman's rights under the Jones Act, most certainly must they be dispelled upon consideration of the analogy so improvidently chosen by the Learned Court where it said

> "Almost as well might it be said that one who is employed to shovel snow from the sidewalk and who, in the process, stumbles upon the unremoved snow, may hold the employer to a common law liability for negligent maintenance of an obstacle in a public right of way."

No parity can possibly exist between employment as a seaman and shoveling snow, working upon navigable waters and a sidewalk, by the careless handling of necessary boat equipment and the maintenance of an obstacle in a public right of way, but more important than the factual disparities in the analogy is the complete repugnance of the legal theories involved. In the case of the ordinary workman, common law rules of liability determine the rights of the parties while the seaman, the special ward of Admiralty, is protected by the derogation of these rules. It would be fruitless to labor over giving expression to this argument when there is at hand a thorough and lucid statement in this Court's opinion in the case of *Socony Vacuum Oil Company vs. Smith,* 305 U. S. 424 where the then Justice Stone said:

> "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed. The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior

> officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been *to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling.*" . . .

or as has been said by the Third Circuit Court of Appeals (within which Federal jurisdiction the State of New Jersey lies) by Circuit Judge Jones in *Armit vs. Loveland,* 115 Fed. 2d 308:

> "The same peculiar circumstances attending the employment require that the rules of the common law respecting proof of the employer's negligence be not visited too rigorously upon seamen. Stated conversely, a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore, Storgard vs. France and Canada S. S. Corp., 2 Cir., 263 F. 545."

Finally attention is called to the positive declaration made by the court that

> "The footboard did not give way under the plaintiff's weight."

There is nothing in the record of testimony justifying such a statement, rather is the evidence such that a reasonable inference to the contrary might be drawn by the proper fact finding body. In any event, it was one of the fact

questions which if resolved in favor of the plaintiff would have justified a verdict in his behalf.

It is respectfully submitted that for these considerations this Honorable Court should grant a writ of certiorari to review decision of the New Jersey Court of Arizona Appeals in this matter.

WILLIAM CALVIN GOTSHALK.

APPENDIX

Doc. No. 14282

STATE OF NEW JERSEY

COURT OF ERRORS AND APPEALS

February Term, 1943

Appeal from Supreme Court
Error to Court

Stanley F. Wallace
Appellant
and
Delaware River Ferry Co. of N. J.
Respondent

No. 16 of Feb. Term, 1943,
Date , 19
The Chancellor presiding.
Opinion Bigelow

CHECK LIST	Affirm	Reverse	Modify
The Chancellor	X		
" Chief Justice			
Mr. Justice Parker	X		
" " Case			

"	" Bodine		X
"	" Donges	X	
"	" Heher		
"	" Perskie		X
"	" Porter	X	
"	" Colie		
Judge Dear		X	
"	Wells	X	
"	WolfsKell		
"	Rafferty		X
"	Hague	X	
"	Thompson		X
		—	—
	Totals,	7	4

STATE OF NEW JERSEY

SEAL

Department of State.

I, JOSEPH A. BROPHY, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of Checklist in the case of:— Stanley F. Wallace, Appellant, and Delaware River Ferry Co. of N. J., Respondent as the same is taken from and compared with the original Filed May 18, 1943, and now remaining on file in my office.

In Testimony Whereof, I have hereunto set my
SEAL hand and affixed my Official Seal of said Court at Trenton, this Tenth day of August, A.D. 1943.

J. A. BROPHY,
Secretary of State.

RULE ON AFFIRMANCE OF JUDGMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STANLEY F. WALLACE, Plaintiff-Appellant, vs. DELAWARE RIVER FERRY COMPANY OF NEW JERSEY, Defendant-Respondent.	Appeal to Supreme Court. Rule on Affirmance of Judgment.

This cause having been duly argued at the February term, 1943, of this Court by Bartholomew A. Sheehan, Esquire, of counsel for the appellant, and French, Richards & Bradley, of counsel for the respondent, and the Court having considered the same and finding no error in the record of the proceedings in the Supreme Court;

It is, thereupon, on this eighteenth day of May, 1943, ORDERED that the judgment of the Supreme Court, removed by appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with the judgment and the practice of said Court.

On motion of:

FRENCH, RICHARDS & BRADLEY,
Attorneys of Respondent.

ENDORSED:
"FILED MAY 27 1943
J. A. BROPHY
CLERK."

STATE OF NEW JERSEY

SEAL

Department of State.

I, JOSEPH A. BROPHY, Secretary of State of the State of New Jersey and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of Rule on Affirmance of Judgment in the case of Stanley F. Wallace, Plaintiff-Appellant, vs. Delaware River Ferry Company of New Jersey, Defendant-Respondent as the same is taken from and compared with the original Filed May 27, 1943, and now remaining on file in my office.

In Testimony Whereof, I have hereunto set my
SEAL hand and affixed my Official Seal of said Court at Trenton, this Seventh day of August A. D. 1943.

J. A. BROPHY,
Secretary of State.

(2)

SEP 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943. No. 270.

STANLEY F. WALLACE,

Petitioner,

v.

DELAWARE RIVER FERRY COMPANY OF NEW JERSEY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL H. RICHARDS,
Counsel for Respondent.

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Of Counsel.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943 **No. 270.**

STANLEY F. WALLACE,

Petitioner,

v.

DELAWARE RIVER FERRY COMPANY OF NEW JERSEY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OFFICIAL REPORTS OF OPINIONS OF COURTS BELOW.

The opinion of the Camden County Common Pleas Court in granting respondent's motion for a non-suit at the close of petitioner's case is not officially reported but appears in the record at page 86. The opinion of the New

Jersey Supreme Court, affirming the action of the Camden County Common Pleas Court is reported in 127 N. J. L. 513. The opinion of the New Jersey Court of Errors and Appeals, affirming the decision of the New Jersey Supreme Court, is reported in 130 N. J. L. 216.

JURISDICTION.

This case involves the right of the petitioner to recover damages under the Jones Act. (Act of March 4, 1915, c. 153 § 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. A. 688) At no time during the course of the proceedings in the state courts did petitioner specially set up or claim either a violation of his constitutional right to a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States, or a violation of Article 3, Section 2 of the Constitution of the United States. Respondent therefore respectfully submits that petitioner has not brought himself within this Court's jurisdiction so far as any constitutional right, title, privilege or immunity is concerned.

The sole federal question is whether the three state courts, which have heretofore considered this case, erred in determining that petitioner had not sustained the burden of proof imposed upon him by law.

STATEMENT OF CASE MATERIAL TO QUESTIONS INVOLVED.

(a) History of case.

In 1938, petitioner instituted suit in the Camden County Common Pleas Court, under authority of the Jones Act (Act of March 4, 1915, c. 153, § 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. A. 688) to recover for personal injuries sustained in the course of his employment as a deckhand on respondent's ferry boat. The allegations of negligence were as follows:

"7. The negligence of the servants, agents and employees of the defendant company consisted in this: that the gangplank over which passengers carried by the defendant company walked from the boat to the slip was carelessly, negligently and recklessly permitted to lay on the slip, extending beyond the edge of said slip; that the said gangplank was not properly and carefully fastened at the side of the dock in the place properly reserved for its keeping." (Complaint—R. 2)

At the close of petitioner's case, respondent moved the trial court for a non-suit on the ground that the petitioner had failed to prove any actionable negligence, (R. 86), which motion was granted (R. 86 to 88). Upon appeal, the action of the trial court was affirmed by the New Jersey Supreme Court (R. 107 to 111). Petitioner thereupon appealed to the New Jersey Court of Errors and Appeals, and on May 18, 1943, that court affirmed the judgment of the New Jersey Supreme Court for the reasons expressed in the opinion of that court (R. 116).

(b) Factual Statement.

The pertinent facts are:

1. Petitioner, Stanley F. Wallace, was employed by the respondent, The Delaware River Ferry Company of New Jersey, on July 7, 1923, on its ferry boats which it operated in interstate commerce between Camden, New Jersey, and Philadelphia, Pennsylvania. (Stipulation—R. 95)

2. Between 7:00 and 7:30 P. M. on June 25, 1936, while petitioner was working for respondent as a deckhand on the ferry boat, "Atlantic City", he sustained an injury at South Street ferry terminus, Philadelphia, Pennsylvania, as the boat was being docked (Stipulation—R. 95).

3. The locale of the accident may be described as follows:

a. The ferry boat as it is being docked comes into the "rack" or "slip" (which consists of two rows of pilings, one on each side of the boat, which guide the boat to the bridge) (R. 21, 35).

b. Connecting the ferry boat with the shore is the "bridge", the shore end of which is fixed while the boat or water end, which is elliptical to fit the boat, is raised or lowered by a wheel and chains to meet the level of the boat, depending on the tide (R. 19, 27).

c. Running lengthwise down the bridge and separating the two passenger walkways on the outside from the motor vehicle passageway in the center are two heavy wooden "swingbacks" which protrude about sixteen to eighteen inches beyond the elliptical or river end of the bridge and rest on the boat (R. 34).

d. In addition to the wheel and chains which raise and lower the bridge, there are on either side of the bridge "pulling in wheels" to which are connected ropes with hooks on the ends thereof, which hooks are fastened to eyes on the shore end of the boat, constituting the mechanism which holds the boat fast to the bridge (R. 20, 21, 26).

e. There is also a "footboard" which is placed over the juncture of the boat and the bridge (R. 26).

4. Petitioner had been a deckhand continuously for nine years. He was thoroughly familiar and conversant with his duties. It was his duty to come outside (on the forward deck) when the boat was three or four feet away from the dock and *wait until the boat was in and then hook the boat up and slide the footboard over.* After this, he was to let the passengers out, and he and others were to let the motor vehicles off. He made over twenty round trips a day to South Street and was familiar with the bridge, the footboard and all other things there. (R. 45, 46, 48, 49, 50)

5. Prior to the accident, petitioner had gone through the passenger gate on the starboard side of the boat and was standing on the front end by said gate, waiting for the boat to come in (R. 34, 62).

6. As the front end of the boat approached the bridge, the left or "downtown" side was nearer to the bridge, and the deck of the boat on the left side came under the swingback on that side first. At that time, the right or "uptown" side of the boat was three or four feet from the bridge. (R. 36, 62, 63)

7. When the right side of the boat on which petitioner was standing was about six inches from the bridge, he went to

reach for the cable with which to hook up his side of the boat. As he started to step on the bridge with his left foot, petitioner saw the foot board sticking out about two inches over the end of the bridge. He did not see the foot board until he made the step. When he first looked, he was already over balanced on the left foot and couldn't jump back. (R. 36, 37, 51, 59)

8. Petitioner's foot was caught between the boat and the bridge (R. 24).

9. Some vital factors, dispositive of petitioner's right to prevail, are:

a. There was nothing unusual about the operation of the boat (R. 23, 27, 28).

b. The weather was clear and it was daylight at the time (R. 27).

c. The boat and bridge were level with each other (R. 28).

d. The bridge was not unclean or slippery (R. 28, 39).

e. At the time of the accident, the footboard was lying flat on the bridge as it always lay (R. 26), and there is no testimony that the footboard was not in its customary or proper place, or that it was not where petitioner expected it to be.

f. As petitioner stepped from the boat to the bridge, he did not look where he was stepping (R. 59, 60).

g. There is an entire absence of proof in this case with respect to the standard imposed upon the ferry company in the use of footboards and any departure from that standard.

ARGUMENT.

I.

The judgment of the New Jersey Court of Errors and Appeals in affirming the judgment of the New Jersey Supreme Court, which, in turn, affirmed the judgment of the trial court, is proper in the light of the federal statutes, and the decisions construing said statutes, and is not in conflict with same.

The Jones Act does not make the employer an insurer. An employer's liability for injuries sustained by a seaman in the course of his employment rests upon the negligence of the employer, which negligence must be affirmatively proved. The burden of proving such negligence rests upon the employee, and is never presumed, *DeZon v. American President Lines,* 317 U.S. —, 63 Sup. Ct. Rep. 814; *Chicago M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472; *Gulf, M. & N. R. Co. v. Wells,* 275 U. S. 455; *Missouri Pac. R. Co. v. Aeby,* 275 U. S. 426; *New Orleans & N. E. R. Co., et al. v. Harris,* 247 U. S. 367.

Petitioner did not sustain the burden of proof imposed by law upon him.

The Complaint sets forth two allegations of negligence; namely, (1) that the gangplank (footboard) was carelessly, negligently and recklessly permitted to lie on the slip (bridge) extending beyond the edge of said slip (bridge) and (2) that the gangplank (footboard) was not properly and carefully fastened at the side of the dock in the place properly reserved for its keeping.

1. The only pertinent testimony with respect to petitioner's first allegation of negligence was that of the petitioner, as follows:

"A. Well, I believe the pilot gave the engineer the signal to bring the boat in and when the boat come in it come in pretty good in order to get underneath the bridge and as the boat was a few inches away, maybe six inches, I went to reach for the cable, what we call the rope and I couldn't reach and I had to put my foot on the bridge and I discovered the footboard was there and stuck out over the end of the bridge.

Q. Then what happened?

A. As I went to step on the bridge with my left foot I discovered the board was there, my balance was all to the left side, and I went on my knee. I missed it, missed the boat, and I went on my knee and I quick jumped up and when I did my foot was fast and it was sliding with the boat. I turned around, turned all the way around, like this (indicating) and I started to holler to the pilot, 'Hold the boat! please hold it!' (R. 36, 37.)

Q. When you came in you saw the footboard lying on the bridge, underneath the bridge spinning wheel?

A. I didn't, not at the time I came out the gate.

Q. Did you see at any time as you were coming in there the footboard lying on the bridge, underneath the bridge spinning wheel?

A. I didn't see it until I made the step. I didn't notice until I was making the step with the left foot.

Q. When did you look the first look?

A. When I went to pick up the cable to hook that up and I was already over-balanced on the left foot and I couldn't jump back. (R. 51)

Q. Pardon me, please. You put your foot on the top of the board, did you?

A. Yes.

Q. You did raise that high enough to put it on the top of the board?

A. High enough but it slipped down. (R. 57).

Q. This is what I want to know: Before you stepped off the boat on to the bridge, you looked down there to see where you were stepping, didn't you?

A. No, I wasn't watching there. I was watching for the boat to come in.

Q. So that you did not watch where you stepped, did you?

A. You didn't have to look where you stepped." (R. 59)

It is respectfully submitted that this testimony was clearly insufficient to justify a finding by a jury that the defendant carelessly, negligently and recklessly permitted the footboard to lie on the slip, extending beyond the edge of said slip and that such negligence was the proximate cause of the plaintiff's injuries.

2. There is absolutely no testimony with respect to the second allegation of negligence in this case. Furthermore, there was no proof of any rule, regulation, or requirement that the footboard be fastened at the side of the bridge, or of any custom or practice that the footboard was ever fastened at the side of the bridge. On the other hand, the uncontradicted and undisputed testimony of petitioner's witness, Mr. Cox, who was the bridgeman in charge of the bridge at South Street Ferry terminus, was that at the time of the accident he saw the footboard lying flat on the bridge and that "it always lays flat." (R. 26) This testimony conclusively disposes of petitioner's second allegation of negligence.

The trial court, considering all evidence adduced in sup-

port of the foregoing allegations of negligence, in disposing of respondent's motion for a non-suit, said,

> "THE COURT: The determination of this motion cannot rest upon any finding that the plaintiff was guilty of contributory negligence as a matter of law and therefore not entitled to recover, because in this kind of action, contributory negligence is not an absolute defense even where it does exist. We must search instead for the cause of the accident, the nature of the happening which produced injury to the plaintiff, * * * (R. 86)
>
> "Now, as to any place being reserved or that place being a proper place, there has been no proof, so that we may eliminate the idea of the board being properly or carefully fastened at any place, because there is no indication that there was a place for it, and that brings me to the inquiry as to what was a standard imposed upon the ferry company and what departure from that standard was there. The most that is said by the plaintiff is that the board extended beyond the edge of the slip. Now, it may have been perfectly proper for the board to have extended beyond the edge of the slip two inches, as he says, and without any negligence on the part of the defendant company. In fact, that might have been the accustomed place for it. There is nothing, in other words, that indicates to my mind wherein the company was negligent, what it did or what it permitted to be done or what it suffered to exist that was a departure from a standard imposed upon it.
>
> "Negligence is never presumed; it must be affirmatively shown. There is no indication in the plaintiff's proofs as to what may have been the proper place or the accustomed place or even a safe place for the

> board to be. I look upon this happening as something purely fortuitous, something that if produced by negligence at all, was more nearly produced by the sole negligence of the plaintiff than of anyone else, and not merely contributory negligence on his part. I can't adopt in my own mind any theory on which the plaintiff has shown a right to recover, and for that reason the motion must be granted." (R. 88)

The New Jersey Supreme Court examined the record to determine whether the facts shown by the testimony were such as to support an inference that the defendant company, through its agents, was negligent in permitting the footboard to lie on the surface of the dock extending slightly over the edge. That court, in its opinion of affirmance, inquired,

> "Where should the footboard have been? Was there a standard practice and, if so, what? Where, by the long continued practice of the defendant's employees, at that particular ferry, should it have been? Upon what act or word of the defendant or of the defendant's employees did plaintiff have justified reason to believe the footboard would be elsewhere?" (R. 110)

and determined that these questions are not answered in the proofs.

The federal courts have long recognized that in cases of this type it is incumbent upon the petitioner, in order to establish negligence on the part of the respondent, to show the safe or proper practice under the circumstances and also a deviation from or failure to observe that practice. *Buffalo & Grand Island Ferry Co. v. Williams,* 25 F. (2d) 612; *Calmar S. S. Corporation v. Taylor,* 92 F. (2d) 84, certiorari denied, 303 U. S. 643; *Union Ins. Co. v. Smith,* 124 U. S. 405.

Where a plaintiff has failed to sustain the burden of proof imposed upon him in cases arising under the Jones Act, this Court, as well as the other federal courts, has consistently upheld the authority and duty of the trial court to take the case from the jury and to find against the plaintiff. It has been repeatedly held by this Court that before evidence may be left with the jury there is a preliminary question for the judge to determine; namely, whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. *Atlantic Coast Line R. Co. v. Davis,* 279 U. S. 34; *Gulf M. & N. R. Co. v. Wells,* 275 U. S. 455; *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333.

II.

Purpose of Writ of Certiorari.

The decisions are legion and uniform with respect to the attitude of this Court regarding the granting of petitions and directing the issuance of writs of certiorari. This is a jurisdiction to be exercised sparingly, only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U. S. 251.

In cases involving the propriety of the action of state courts in permitting or refusing to permit submission of cases to juries, it has been held by this Court that, to justify the issuance of a writ of certiorari, there should be palpable error. *Baugham v. N. Y. P. & N. R. Co.,* 241 U. S. 237. In the case of *Great Northern R. Co. v. Knapp,* 240 U. S. 464 which was a suit under the Federal Employer's Liability Act in which the question of the propriety of the

trial court's action in allowing the case to go to the jury was raised, Mr. Justice Hughes, in speaking for this Court, stated;

> "* * * The case, then, is one in which there is no question as to the interpretation of any provision of The Federal act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 355, 60 L. ed. —. 36 Sup. Ct. Rep. 126."

CONCLUSION.

It is therefore respectfully submitted that the Application for Writ of Certiorari should be denied and the Petition dismissed.

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